First Sterling Corp. v Union Sq. Retail Trust
2012 NY Slip Op 33378(U)
February 10, 2012
Supreme Court, New York County
Docket Number: 600868/10
Judge: Barbara R. Kapnick

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK PART 39

Index Number : 600868/2010
FIRST STERLING CORP.
vs
UNION SQUARE RETAIL TRUST
Sequence Number : 001
DISMISS ACTION

INDEX NO. 600868/10
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/10/12

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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FIRST STERLING CORPORATION and
WEST REALTY CO., LLC,

Plaintiffs,

- against -

UNION SQUARE RETAIL TRUST, OTR, STATE TEACHERS RETIREMENT BOARD OF OHIO, UNION SQUARE DEVELOPMENT ASSOCIATES, LLC, and UNION SQUARE DEVELOPMENT ASSOCIATES II, LLC,

Defendants.

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DECISION/ORDER
Index No. 600868/10
Mot. Seq. No. 001

BARBARA R. KAPNICK, J.:

Background

Plaintiffs First Sterling Corporation ("First Sterling") and West Realty Co., LLC ("West Realty") (together, "plaintiffs" or "the Landlord") are the owners/landlord of the property located on Union Square South in Manhattan.

On December 13, 1996, plaintiffs entered into a 99-year ground lease (the "Ground Lease") with defendant OTR, as the duly designated nominee of the State Teachers Retirement Board of Ohio ("STRBO") (collectively, "OTR" or "the Tenant").

The Ground Lease provided for the Tenant to commence and complete construction of a building (the "Premises") by specified dates, and to sublease portions of the Premises for retail use by

subtenants. On December 13, 1996, the same day that the Ground Lease was entered into, the Tenant entered into subleases with three entities; United Artists Theater Circuit, Inc. (the "United Artists Sublease"), Virgin Entertainment Group, Inc. (the "Virgin Entertainment Sublease") and Circuit City Stores, Inc. (the "Circuit City Sublease"). These subleases were identified in the Ground Lease as the Initial Subleases. Two of those Initial Subleases are at issue in this lawsuit; the Virgin Entertainment Sublease and the Circuit City Sublease.

In February 2008, OTR created Union Square Retail Trust ("USRT" or "Tenant") and assigned the Ground Lease to it. As a result, USRT assumed OTR's rights and obligations with regard to the Ground Lease and the Initial Subleases. In March 2008, OTR conveyed 49% of its beneficial interest in USRT to Related Union Square Retail Associates, LLC ("Related Associates"), a Delaware limited liability company, which is an affiliate of The Related Companies, LP ("Related Companies"). OTR retained a 51% stake in USRT.

Plaintiffs allege that the parties to the Ground Lease expected the value of the retail space to increase over time and that, under certain circumstances, the Tenant might enter into new subleases to successor subtenants. Therefore, the Ground Lease

contained various provisions insuring that the Landlord would share in the likely increasing retail value of the Premises and the corresponding increased rental rates that would be paid by subsequent retail subtenants. Section 3.4 (a) of the Ground Lease provides that the Tenant shall pay the Landlord, as additional rent, the "Percentage Rent Payments" (i.e., a percentage of the retail occupants' gross receipts over a certain threshold amount, generated in the space devised under the Initial Subleases) ("Percentage Rent Payment" or "Percentage Rent"). Under the Ground Lease, Percentage Rent Payments are the property of, and payable to, the Landlord.

Section 3.4 (c) provides, in relevant part, as follows:

> (c) Prohibitions Re: Initial Subleases.
>
> Tenant shall not, without having first obtained landlord's written consent thereto, (i) amend or modify any of the Initial Subleases in any manner which will (or might) affect any provisions of the Initial Subleases relating to PRP [Percentage Rent Period] Sublease Percentage Rent (including without limitation any provisions relating to the amount, payment or collection of any PRP Sublease Percentage Rent, *(ii) terminate, cancel or accept a surrender of any of the Initial Subleases* (other than a termination by Tenant, as landlord, as a result of a material default by the Initial Subtenant under the Initial Sublease . . . . . and (iii) settle or comprise [sic] any proceeding or claim under any Initial Sublease relating to PRP Sublease Percentage Rent . . .

(emphasis added).

Section 3.4 (d) of the Ground Lease specifies circumstances under which the Tenant's base rent shall increase, and provides:

> (d) Increases in Base Rent.
>
> If, consistent with the provisions of Section 3.4 (c) above, either (i) any Initial Sublease is terminated by Tenant by reason of a material default, or (ii) any Initial Sublease shall be terminated pursuant to any bankruptcy or other legal proceeding, then, in either case, effective as of the execution and delivery (at any time prior to the First Revaluation Date) of a Sublease in replacement of each such terminated Initial Sublease (each being herein called a "Replacement Sublease"), the Annual Lease Base Rental Rate then in effect under this Lease shall be increased by the greater of . . .

(emphasis in original).

Under the above provision, if an Initial Sublease was terminated, and a new sublease lease entered into (a "Replacement Sublease"), the Landlord would be entitled to an increase in base rent, which would be calculated based upon any increase in rent to the defendants.

The Circuit City Sublease

On November 10, 2008, Circuit City filed for bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code. On or about March 10, 2009, a public auction was held, at which Circuit City's interest in its sublease was available for purchase.

Plaintiffs allege that three entities submitted bids for the Circuit City Sublease prior to the commencement of the auction: (1) USRT, (2) Best Buy, Inc., and (3) Raymour & Flanigan. USRT was the successful bidder through a credit bid as the landlord under the Circuit City Sublease. Thus, USRT, which had acquired the rights of the Tenant, had now also acquired the rights to the Circuit City Sublease.

Eight days prior to the auction, on March 2, 2009, USRT had created a single-purpose entity of which USRT is the sole owner and member, Union Square Development Associates, LLC ("USDA I"). Plaintiffs allege that USRT effected a termination by directing that the Circuit City Sublease be asigned, effective as of March 16, 2009 to USDA I. Plaintiffs also allege that thereafter, between March and September 2009, USRT replaced the Circuit City Sublease by having USDA I, its alleged alter ego, sub-sublease the portion of the Premises demised in the Circuit City Sublease to Best Buy, Inc. ("Best Buy").

The Virgin Entertainment Sublease

As to the Virgin Entertainment Sublease, plaintiffs allege that in or about 2007, the retail operations of Virgin Entertainment Group, Inc., including its Virgin Megastores in the United States, were struggling to remain a viable retail business.

In July 2007, The Related Companies, through an affiliate, purchased Virgin Entertainment Group, Inc. As mentioned *supra* at p. 2, in March 2008, the Related Companies, through an affiliate, Related Associates, acquired a 49% interest in USRT. Thus, as of March 2008, Related owned a 49% interest in USRT, the Tenant of the Ground Lease, and, through another affiliate, owned Virgin Entertainment Group, the subtenant. On April 15, 2009, USRT created Union Square Development Associates II, LLC ("USDA II").

The Virgin Megastore, located in the portion of the Premises demised under the Virgin Entertainment Sublease, was closed sometime in May 2009. According to plaintiffs, on or about June 23, 2009, Virgin Entertainment Group, Inc. conveyed the Virgin Entertainment Sublease to USDA II.

Plaintiffs further allege that, on or about July 16, 2009, USRT had USDA II sub-sublease a portion of the space demised in the Virgin Entertainment Sublease to Nordstrom, Inc. for use as a Nordstrom Rack discount department store ("Nordstrom Rack"). In addition, in November 2009, USRT had USDA II sub-sublease another portion of the space to Citibank, Inc. ("Citibank"), and in December 2009, USRT had USDA II sub-sublease a portion of the space to Duane Reade, Inc. ("Duane Reade") for use as a drug store.

Plaintiffs contend that the above "assigned" subleases, are in fact, "Replacement Subleases," as that term is defined in Section 3.4 (d) of the Ground Lease. Plaintiffs allege that the Tenant thus breached the Ground Lease by entering into Replacement Subleases upon the failure of the Initial Subleases, by failing to pay the Landlord additional rents pursuant to the terms of the Ground Lease and by failing to obtain the Landlord's consent to the Replacement Subleases.

Plaintiffs further allege that, upon information and belief, the rents payable to the defendants under the Best Buy, Nordstrom Rack, Duane Reade and Citibank sub-subleases are higher than the rent provided for in the Initial Subleases. Thus, plaintiffs allege, instead of sharing the economic benefits of the Replacement Subleases with plaintiffs, as contemplated by the parties under the Ground Lease, USRT instead seeks to retain all of the benefits of the Increased Base Rent derived from the Replacement Subleases.

Defendants, however, argue that the Ground Lease contains no restrictions on Circuit City's and Virgin Entertainment's rights to assign or sub-sublease the Initial Subleases to others. In fact, section 17.2 (a) of both the Circuit City and Virgin Entertainment Initial Subleases provide, in relevant part, that "[n]otwithstanding anything to the contrary set forth above,

Tenant may, subject to the terms and conditions hereinafter set forth, with the consent of Landlord, assign its interest in this Lease . . ." to a list of entities including an "entity which shall . . . be under the control of, or (C) be under common control with Tenant (... a 'Related Entity')."

Plaintiffs filed their original Complaint on April 6, 2010. In July 2010, after this motion was made, plaintiffs filed an Amended Complaint[1] alleging the following causes of action: breach of contract against USRT, OTR and STRBO for terminating, cancelling or accepting the surrender of the Circuit City and/or Virgin Entertainment Initial Subleases without the Landlord's consent, or, in the event the Court determines that the Subleases were permissibly terminated, the Tenant breached its contractual obligations to Landlord under Section 3.4(c) of the Ground Lease by refusing to pay Landlord Increased Base Rent with respect to Replacement Subleases (first cause of action); a declaratory judgment determining, *inter alia*, the future rent due from Tenant to Landlord based upon Tenant's breach of Section 3.4 (c) of the Ground Lease and the replacement of the Initial Subleases with the Replacement Subleases (second cause of action); breach of the covenant of good faith and fair dealing against USRT, OTR and STRBO

[1] Defendants chose to exercise their option to have the motion to dismiss applied to the Amended Complaint. (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 [1st Dep't 1998]).

(third cause of action); unjust enrichment as against USDA I and USDA II (fourth cause of action); breach of contract against USRT, OTR and STRBO affecting the Landlord's rights to Percentage Rent (fifth cause of action) and breach of contract against USRT, OTR and STRBO with respect to allowing non-retail use of the Premises (sixth cause of action).

Defendants now move to dismiss the Amended Complaint in its entirety.

Discussion

In the first cause of action, plaintiffs allege that the Tenant (identified by plaintiffs as STRBO, OTR and USRT) has breached Section 3.4 (c) of the Ground Lease by terminating, cancelling, or accepting the surrender of the Circuit City and/or Virgin Entertainment Subleases without the Landlord's consent. Alternatively, in the event that the Court determines that these Initial Subleases were permissibly terminated by the Tenant pursuant to Section 3.4 (d), then plaintiffs allege that the Tenant has breached its contractual obligations to the Landlord under that section by refusing to pay Landlord the Increased Base Rent with respect to the Replacement Subleases.

According to plaintiffs, defendants' scheme to breach the Ground Lease and then conceal that breach is evidenced by its creation of the two single-purpose entities of which the Tenant is the sole owner and member, USDA I and USDA II (Amended Complaint, ¶ 36). Plaintiffs allege that USDA I and USDA II are alter egos of Tenant, and that the Tenant arranged for them to gain control of the Circuit City and Virgin Entertainment Initial Subleases after each store had gone dark, and then to re-lease the retail space demised under these Initial Subleases through Replacement sub-subleases at higher sub-rents.

It is well settled that contracts which are clear and unambiguous should be enforced according to their plain meaning (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]). "This principle is particularly important '" in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated counseled business people negotiating at arm's length"'" (citations omitted) (*id.* at 277).

As to the first cause of action, plaintiffs have not sufficiently alleged that defendants breached section 3.4 (c) of the Ground Lease. That section, as set forth above, requires the Landlord's consent in order for the Tenant to "terminate, cancel or

accept a surrender of any of the Initial Subleases." Although Circuit City and Virgin Entertainment each surrendered *possession* of the demised premises, they did not surrender their Subleases, but rather assigned them, as was permitted under those Subleases.

Plaintiffs argue that a surrender, termination or cancellation can be evidenced by the parties' actions even where there are documents that might indicate otherwise. Plaintiffs cite *Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689 (1986) in which the Court held that "[a] surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated . . . [w]hether a surrender by operation of law has occurred is a determination to be made on the facts" (*Riverside* at 691-692).

However, in that case, and others cited by plaintiffs, the central question was whether the landlord had taken any affirmative action to permit the tenant to surrender the lease, thereby relieving the tenant of any further obligations under the lease.

Here, there is no dispute that the parties to the assignment of the Initial Subleases took no action consistent with a surrender of the Initial Subleases, but rather acted in accordance with an assignment. Moreover, the Tenant, Circuit City and Virgin

Entertainment had the right under the Ground Lease to make these assignments.

Furthermore, pursuant to its Order of March 17, 2009, the Bankruptcy Court for the Eastern District of Virginia, Richmond Division authorized the assignment of the Circuit City Sublease to USDA and annexed thereto the "Assignment and Assumption Agreement" between Circuit City and USDA dated as of March 16, 2009. As to the Virgin Entertainment Sublease, although this Court has not been provided with a copy of the document assigning the sublease, plaintiffs acknowledge in their Amended Complaint that "The Related Companies, the effective 49% owner of Tenant, conveyed the Virgin Entertainment Initial Sublease to USDA II" (Amended Complaint, ¶ 68).

As to plaintiffs' allegation in ¶ 115 of the Amended Complaint that defendants breached section 3.4 (d) of the Ground Lease, by "refusing to pay Landlord Increased Base Rent with respect to Replacement Subleases" in accordance with any increase in the rent paid by the new subtenants, Section 3.4 (d) specifically provides that the Base Rental Rate would be increased if "either (i) any Initial Sublease *is terminated by Tenant* by reason of a material default, or (ii) any Initial Sublease *shall be terminated pursuant to any bankruptcy* or other legal proceeding . . ." (emphasis added).

[* 14]

Here the Tenant did not terminate either the Circuit City or the Virgin Entertainment Initial Subleases by reason of a material default, nor was the Circuit City Sublease terminated by bankruptcy. As indicated above, the Bankruptcy Court Order specifically authorized and directed the assignment of the Circuit City Sublease to USDA.

Plaintiffs further urge this Court to consider that by creating USDA I and USDA II, USRT managed to achieve, through alter egos, an assignment of the Initial Subleases, which it could not otherwise have done. Plaintiffs contend that the purported assignment from Circuit City to USRT's alter ego, USDA I, was effectively an assignment of the Initial Sublease back to USRT, the landlord thereunder, resulting in the termination of the Circuit City Sublease. Likewise, plaintiffs argue, the purported assignment from Virgin Entertainment to USDA II was a surrender of Virgin Entertainment's rights as tenant under its Initial Sublease, back to the landlord thereunder, also resulting in the termination of the Virgin Entertainment Sublease.

In essence, plaintiffs contend that USRT thereby created a situation in which it is both the landlord under the purportedly assigned Initial Subleases and, through its alter egos, the tenant under these same leases. Since a party cannot contract with itself, plaintiffs argue that the Initial Subleases were rendered void and were, therefore, terminated and cancelled by operation of law.

On a motion to dismiss a complaint, "the Court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every favorable inference (citation omitted). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co..*, 5 NY3d 11, 19 [2005]).

The doctrine of piercing the corporate veil is typically employed by a party seeking to go behind the corporate form in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-141 [1993]). " A [party] seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2d Dept 2009], *affd* 16 NY3d775 [2011]).

Here plaintiffs seek to disregard the corporate form with respect to USDA I and USDA II based upon allegations that these companies were created by USRT solely for the purpose of assignment

of the Circuit City and Virgin Entertainment Initial Subleases. This Court notes, parenthetically, that the use of single purpose entities for real estate transactions is not only permitted under New York law, but is very common. Given the fact that the assignment of these subleases was specifically permitted by the lease documents, plaintiffs' assertion that they would have received an increase in rents had the Initial Subleases been terminated is insufficient grounds upon which to seek intervention of a court in equity. Nor have plaintiffs alleged that defendants ignored the corporate form or acted in any other manner which would provide sufficient grounds to ignore the corporate form. Accordingly, plaintiff's first cause of action is dismissed.

Plaintiffs' second cause of action is for declaratory relief based on the Landlord's claim that it is entitled to Increased Base Rent. Inasmuch as this Court has already held that there are no grounds for determining that the Initial Subleases were terminated by Tenant or by reason of bankruptcy, this cause of action is dismissed.

The third cause of action alleges a breach of the implied covenant of good faith and fair dealing based upon defendants' actions which have deprived the Landlord of its rights under the Ground Lease, specifically with respect to Increased Base Rent. However, the Ground Lease does not prohibit the transactions that plaintiffs are protesting. "[T]he implied covenant of good faith

and fair dealing inherent in every contract cannot be used to create terms that do not exist in the writing" (*Vanlex Stores, Inc. v BFP 300 Madison II LLC*, 66 AD3d 580, 581 [1st Dept 2009]). Nor, in the absence of ambiguity, may a court imply any terms which are not expressed by the parties within the four corners of their contract (*Goldman Sachs Group, Inc. v Almah LLC*, 85 AD3d 424 [1st Dept 2011], *lv dism* __NE2d__ Jan. 17, 2012). Accordingly, where, as here, the Initial Sublease does not provide for an increase in base rent upon assignment of that sublease, plaintiffs cannot use the covenant of good faith and fair dealing to imply that provision.

Plaintiffs' fourth cause of action is for unjust enrichment and is asserted against USDA I and USDA II. As to this claim, plaintiffs allege that, as alter egos of Tenant, USDA I and II have been unjustly enriched by entering into the sub-subleases with Best Buy, Nordstrom Rack, Duane Reade and Citibank and have collected and retained rent under those subleases, including rent which belongs to Landlord pursuant to the Ground Lease (Amended Complaint, ¶ 136).

A claim for unjust enrichment must allege that (1) the defendant was enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered" (*see Georgia Malone & Co. Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011]). Unjust enrichment is a quasi-contract claim and "is an obligation imposed

by equity to prevent injustice, in the absence of an actual agreement between the parties concerned", (*id.* at 408, *quoting IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). Although privity is not required for an unjust enrichment claim, the claim "will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part" (*id.*). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005], *quoting Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Here, plaintiffs have no relationship with USDA I or USDA II other than their acquisition of the Circuit City and Virgin Entertainment Initial Subleases. The relationship is, therefore, governed by these subleases and plaintiffs may not maintain an unjust enrichment claim against USDA I or USDA II.

In the fifth cause of action, plaintiffs allege that the Tenant "has breached its contractual obligations to Landlord by modifying the Virgin Entertainment Initial Sublease in a way that will or might affect Landlord's right to Percentage Rent" (Amended Complaint, ¶ 140).

Plaintiffs allege that the Virgin Entertainment Sublease restricts the use of the premises demised thereunder to the sale or rental of specified audio and video products and related equipment and accessories. However, the Virgin Entertainment Sublease provides that the subtenant may use the demised premises for any other lawful use provided that the Tenant consents to such use. As part of granting such consent, Section 10.1 (f) of the Virgin Entertainment Sublease requires that the Tenant and its sub-tenant "shall agree upon a percentage rental for such other use based on percentage rents which are customary and usual in the industry and area where the Demised Premises are located".

There is no dispute that the Nordstrom Rack, Duane Reade and Citibank sub-subleases provide for uses other than the sale or rental of audio and video products and related equipment and accessories as provided for in the Virgin Entertainment Sublease. Plaintiffs allege, upon information and belief, that the Tenant consented to alternative uses with respect to these sub-subleases, but did not agree upon a percentage rental appropriate to those alternative uses as required.

Thus, plaintiffs allege that the Tenant has breached Section 3.4 (c) of the Ground Lease by amending or modifying the Virgin

Entertainment Sublease in a manner that will or might affect Landlord's rights to Percentage Rent.

Defendants contend that, notwithstanding this allegation, the Nordstrom Rack and Duane Reade sub-subleases, in fact, provide for Percentage Rent, which if attained, inures to the benefit of plaintiffs. This, however, begs the question as to whether the percentage rental provided for therein is "appropriate" to the alternative uses in the sub-subleases.

Plaintiffs also allege that the sub-sublease to Nordstrom Rack is an impermissible discount use under Section 10.4 of the Virgin Entertainment Sublease which provides that "no portion of the Demised Premises shall be used as, or for . . . so-called "discount stores".

Defendants argue that Nordstrom Rack is not a discount store, but rather a retail store comparable to Macy's. These are all issues of fact which are not appropriately resolved on a motion to dismiss. Accordingly, this cause of action may stand.

Plaintiffs' sixth cause of action alleges that the Tenant breached the Ground Lease by permitting a Citibank branch to be located at the Premises, which is a non-retail use and adversely

affects Landlord's right to Percentage Rent. Plaintiffs rely on the following provision of the Ground Lease:

> Section 23.1 Type of Use. Effective upon the Substantial Completion Date, Tenant shall open the Building and, thereafter throughout the Term, shall use and operate the Premises solely for the Permitted Use (as hereinafter defined) and no other use. The "Permitted Use" shall mean retail use . . .

Defendants argue that a bank branch is "retail use" as defined in the New York City Administrative Code. However, the Ground Lease does not reference or adopt the definition provided in the Administrative Code. Moreover, this is an alternative use under the Virgin Entertainment Sublease which might affect the amount of the Percentage Rent payable to the Landlord.

Accordingly, the motion by defendants to dismiss the Amended Complaint is granted to the extent of dismissing the first, second, third and fourth causes of action. The fifth and sixth causes of action are severed and continued.

Defendants are directed to serve Answers to the remaining two causes of action in the Amended Complaint within 30 days of notice of the e-filing of this Decision.

Counsel for all parties shall appear for a conference in IA Part 39, 60 Centre Street - Room 208 on March 21, 2012 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: February 10, 2012

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.